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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206857
Party	Defendant JPM, Inc.
Correspondence Address	JONATHAN R. SLABAUGH COSENTINO & CHRISTOFENO 115 W LEXINGTON AVE ELKHART, IN 46516-3107  jslabaugh@maplenet.net
Submission	Answer and Counterclaim
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Signature	/Jonathan R. Slabaugh/
Date	10/12/2012
Attachments	Answer_and_Counterclaims_-_JPM-vFINAL.pdf ( 17 pages )(169129 bytes )

**Registrations Subject to the filing**

Registration No	2308937	Registration date	01/18/2000
Registrant	OVERTON'S, INC. 111 RED BANKS ROAD GREENVILLE, NC 27835 UNITED STATES		
Grounds for filing	The registration was obtained fraudulently.		

**Goods/Services Subject to the filing**

Class 017. First Use: 1998/05/04 First Use In Commerce: 1998/05/04  
All goods and services in the class are requested, namely: Protective dock bumpers manufactured from copolymer or from polyethelene with indentations for using bolts to attach the bumpers to docks

Registration No	3449928	Registration date	06/17/2008
Registrant	Overton's, Inc. 111 Red Banks Road Greenville, NC 27834 UNITED STATES		

**Goods/Services Subject to the filing**

Class 019. First Use: 2006/03/01 First Use In Commerce: 2006/03/01  
All goods and services in the class are requested, namely: Dock products, namely, dock wheels, non-metal piling caps, bumpers, cushions, and non-metal profiles and pads for pilings or dock posts

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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GANDER MOUNTAIN COMPANY and	)	
OVERTON'S, INC.,	)	
	)	
Opposers/Counterclaim	)	Opposition No.: 91206857
Defendants,	)	
	)	Serial No.: 85/483,797
v.	)	
	)	Mark: DeckMate
JPM, INC.,	)	
	)	
Applicant/Counterclaim	)	
Plaintiff.	)	
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**APPLICANT'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS  
TO OPPOSERS' NOTICE OF OPPOSITION**

COMES NOW, the Applicant, JPM, Inc. ("**Applicant**"), by its attorneys, Michael A. Christofeno and Jonathan R. Slabaugh of Cosentino & Christofeno, pursuant to Trademark Rule 2.106(b), 37 C.F.R. § 2.106(b), and Rule 8 of the Federal Rules of Civil Procedure, and for its answer, affirmative defenses, and counterclaims to the claims and allegations asserted in the *Notice of Opposition* filed by Gander Mountain Company and Overton's, Inc. (collectively "**Opposers**"), hereby states and alleges that:

**ANSWER**

COMES NOW, the Applicant, JPM, Inc., by its counsel, and for its answers to the averments contained in the Opposers' *Notice of Opposition*, alleges and states that:

1. The averments contained in Paragraph 1 set forth legal conclusions to which no response is required. To the extent a response is required, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments set forth in Paragraph 1 of the *Notice of Opposition* and, therefore, denies the same.

2. The Applicant admits the averments set forth in Paragraph 2 of the *Notice of Opposition*.

3. The Applicant admits the averments set forth in Paragraph 3 of the *Notice of Opposition*.

4. The Applicant admits the averments set forth in Paragraph 4 of the *Notice of Opposition*.

5. The Applicant admits that it appears as though the Opposer Overton's is a retailer of a wide-variety of boat, dock, watersports, and other products. With respect to the remaining averments set forth in Paragraph 5 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

6. The Applicant admits that it appears that the Opposer Overton's maintains and sells products through a catalog and online website. With respect to the remaining averments set forth in Paragraph 6 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

7. The Applicant denies the averments set forth in Paragraph 7 of the *Notice of Opposition*.

8. The Applicant admits that the Opposer Overton's is listed as the owner of record of Registration No. 2,308,937 for the mark DOCKMATE, and further admits that the mark appears to have been registered on January 18, 2000, on the Principal Register for use in connection with "protective dock bumpers manufactured from copolymer or from polyethelene with indentations for using bolts to attach the bumpers to docks" in International Class 17, according to the information presented by the United States Patent and Trademark Office's

online Trademark Electronic Search System for this registration. With respect to the remaining averments set forth in Paragraph 8 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

9. The Applicant admits that the Opposer Overton's is listed as the owner of record of Registration No. 3,216,132 for the mark DOCKMATE, and further admits that the mark appears to have been registered on March 6, 2007, on the Principal Register for use in connection with "ropes; dock line" in International Class 22, according to the information presented by the United States Patent and Trademark Office's online Trademark Electronic Search System for this registration. With respect to the remaining averments set forth in Paragraph 9 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

10. The Applicant admits that the Opposer Overton's is listed as the owner of record of Registration No. 3,307,757 for the mark DOCKMATE, and further admits that the mark appears to have been registered on October 9, 2007, on the Principal Register for use in connection with "metal dock cleats; metal ladders" in International Class 6, according to the information presented by the United States Patent and Trademark Office's online Trademark Electronic Search System for this registration. With respect to the remaining averments set forth in Paragraph 10 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

11. The Applicant admits that the Opposer Overton's is listed as the owner of record of Registration No. 3,402,235 for the mark DOCKMATE, and further admits that the mark appears to have been registered on March 25, 2008, on the Principal Register for use in

connection with “boat fenders” in International Class 12, according to the information presented by the United States Patent and Trademark Office’s online Trademark Electronic Search System for this registration. With respect to the remaining averments set forth in Paragraph 11 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

12. The Applicant admits that the Opposer Overton’s is listed as the owner of record of Registration No. 3,449,927 for the mark DOCKMATE, and further admits that the mark appears to have been registered on June 17, 2008, on the Principal Register for use in connection with “non-metal dock cleats; non-metal dock boxes; non-metal boat mooring whips; and float drums for boat docks” in International Class 20, according to the information presented by the United States Patent and Trademark Office’s online Trademark Electronic Search System for this registration. With respect to the remaining averments set forth in Paragraph 12 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

13. The Applicant admits that the Opposer Overton’s is listed as the owner of record of Registration No. 3,449,928 for the mark DOCKMATE, and further admits that the mark appears to have been registered on June 17, 2008, on the Principal Register for use in connection with “dock products, namely, dock wheels, non-metal piling caps, bumpers, cushions, and non-metal profiles and pads for pilings or dock posts” in International Class 19, according to the information presented by the United States Patent and Trademark Office’s online Trademark Electronic Search System for this registration. With respect to the remaining averments set forth in Paragraph 13 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

14. The averments contained in the first sentence of Paragraph 14 set forth legal conclusions to which no response is required. To the extent a response is required, the Applicant denies the averments contained in the first sentence of Paragraph 14 of the *Notice of Opposition*. With respect to the remaining averments set forth in Paragraph 14 of the *Notice of Opposition*, the Applicant is without sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, denies the same.

15. The averments contained in Paragraph 15 set forth legal conclusions to which no response is required. To the extent a response is required, the Applicant denies the averments contained in Paragraph 15 of the *Notice of Opposition*.

16. The averments contained in Paragraph 16 set forth legal conclusions to which no response is required. To the extent a response is required, the Applicant denies the averments contained in Paragraph 16 of the *Notice of Opposition*.

17. The averments contained in Paragraph 17 set forth legal conclusions to which no response is required. To the extent a response is required, the Applicant admits the averments contained in Paragraph 17 of the *Notice of Opposition*.

18. The averments contained in Paragraph 18 set forth legal conclusions to which no response is required. To the extent a response is required, the Applicant denies the averments contained in Paragraph 18 of the *Notice of Opposition*.

#### **GENERAL DENIAL**

Applicant denies each and every averment contained in the *Notice of Opposition* that is not specifically admitted in its *Answer*.

WHEREFORE, the Applicant, JPM, Inc., by its attorneys, respectfully requests that the Trademark Trial and Appeals Board enter an order:

(1) Dismissing the *Notice of Opposition* filed by the Opposers, Gander Mountain Co. and Overton's, Inc., with prejudice;

(2) Allowing JPM, Inc.'s *Application for Registration* (Serial No. 85/483,797) to issue a registration for its DeckMate mark on the Principal Register; and

(3) Awarding Applicant any and all other relief that the Board deems necessary and proper under the circumstances.

#### **AFFIRMATIVE DEFENSES**

COMES NOW, the Applicant, JPM, Inc., by its attorneys, and for its further answer to the averments contained in the Opposers' *Notice of Opposition*, alleges and states the following affirmative defenses:

First Defense: The Opposer Gander Mountain lacks standing to oppose the Applicant's *Application for Registration* for its DeckMate mark before the Trademark Trial and Appeals Board.

Second Defense: The Opposer Overton's is not in privity with the Opposer Gander Mountain.

Third Defense: The Opposers' *Notice of Opposition* fails to state a claim upon which relief may be granted.

Fourth Defense: The Opposers – and any predecessor-in-interest – intentionally and deliberately misused the federal trademark registration symbol in connection with the marks pled by the Opposers prior to their registration on the Principal Register in violation of Section 29 of the Lanham Act, 15 U.S.C. § 1111.

Fifth Defense: The Opposers have made false, material representations of fact in connection with the trademark applications for and in connection with the maintenance of the marks pled by the Opposers.

Sixth Defense: The Opposers' claims are barred by the doctrines of unclean hands, estoppel, and fraud.

Seventh Defense: The Applicant's mark is not likely to create confusion, cause mistake, or deceive consumers as to the source or sponsorship of its boat and marine seats when used in connection with such goods.

Eighth Defense: The Applicant's mark is substantially different in sound, appearance, and connotation from the marks pled by the Opposers.

Ninth Defense: The Applicant's mark and the marks pled by the Opposers contain different dominant roots.

Tenth Defense: The suffix of the marks pled by the Opposers, "-MATE," is so commonly used that the public will look to other elements of its marks to distinguish the source of its goods.

Eleventh Defense: The overall commercial impression created in the minds of average consumers by the Applicant's mark is substantially different from that created by the marks pled by the Opposers.

Twelfth Defense: The marks pled by the Opposers are highly suggestive and weak and, therefore, are entitled to only a limited scope of protection.

Thirteenth Defense: The "boat and marine seats" associated with the Applicant's mark are not related to the "dock and docking products" associated with the marks pled by the Opposers.



Fourteenth Defense: The mere fact that the Applicant's goods and the Opposers' goods may fall under a broad, overarching umbrella category is too tenuous a connection upon which to base a finding that they are sufficiently related for purpose of likelihood of confusion.

Fifteenth Defense: The channels of trade and potential consumers for the goods associated with the Applicant's mark do not overlap those associated with the marks pled by the Opposers.

Sixteenth Defense: The degree of care and consideration that will be exercised by consumers seeking and purchasing the goods associated with the Applicant's mark is high.

Seventeenth Defense: The mere fact that the Opposer Overton's – as a retailer – may sell disparate goods in the same broad, general industry will not support a finding that the goods are sold through the same trade channels or will be purchased by the same consumers.

Eighteenth Defense: The Opposers will not be damaged by the registration of Applicant's mark.

Nineteenth Defense: The Applicant adopted its mark in good faith and to assist consumers in distinguishing its goods from those currently offered in the market.

Twentieth Defense: The Applicant reserves the right to amend its Answer and to assert and plead additional Affirmative Defenses or Counterclaims that are not now known, but may subsequently become known through discovery or other means.

WHEREFORE, the Applicant, JPM, Inc., by its attorneys, respectfully requests that the Trademark Trial and Appeals Board enter an order:

- (1) Dismissing the *Notice of Opposition* filed by Gander Mountain Co. and Overton's, Inc. with prejudice;

(2) Allowing JPM, Inc.'s *Application for Registration* (Serial No. 85/483,797) to issue a registration for its DeckMate mark on the Principal Register; and

(3) Awarding Applicant any and all other relief that the Board deems necessary and proper under the circumstances.

### **COUNTERCLAIMS**

COMES NOW, the Counterclaim Plaintiff, JPM, Inc. ("**Counterclaim Plaintiff**"), by its counsel, and for its counterclaims against the Counterclaim Defendants, Gander Mountain Co. and Overton's, Inc. (collectively "**Counterclaim Defendants**"), alleges and states that:

### **GENERAL AVERMENTS**

1. The Counterclaim Plaintiff has standing to seek cancellation of the registrations pled by the Counterclaim Defendants (U.S. Registration Nos. 2,308,937; 3,216,132; 3,307,757; 3,402,235; 3,449,927; and 3,449,928) in the opposition proceeding, by virtue of its position as a defendant in the opposition proceeding.

### **COUNT I – CANCELLATION OF U.S. TRADEMARK REGISTRATION NO. 2,308,937**

2. The Counterclaim Plaintiff hereby realleges and restates the averments contained in paragraph 1 of these Counterclaims and incorporates the same by reference as if fully stated in this paragraph.

### **Fraudulent Misuse of Trademark Registration Symbol**

3. On information and belief, Jay A. Reinhardt ("**Reinhardt**") filed an *Application for Registration* (Serial No. 75/565,740) with the United States Patent and Trademark Office ("**USPTO**") on or about October 7, 1998, for the DOCKMATE mark to be used in connection with "protective dock bumpers manufactured from copolymer or from polyethelene with indentations for using bolts to attach the bumpers to docks" in International Class 17.

4. On further information and belief, Reinhardt submitted – as part of his *Application for Registration* – several specimens to the USPTO demonstrating how the mark was being used in commerce.

5. These specimens show the federal trademark registration symbol – ® – being used with the DOCKMATE mark.

6. At the time these specimens were submitted, the DOCKMATE mark was unregistered, and Reinhardt neither owned nor had acquired a right to use the federal trademark registration symbol in connection with the DOCKMATE mark.

7. Reinhardt knew that the DOCKMATE mark was unregistered and that he had no right to use a federal trademark registration symbol in connection with the DOCKMATE mark.

8. This use of the federal trademark registration symbol was a false statement; was improper; and was done with the intent to deceive the purchasing public, competitors, and the USPTO into believing that the DOCKMATE mark was registered when, in fact, it was not.

9. Reinhardt's fraudulent misuse of the federal registration symbol violates Section 29 of the Lanham Act, 15 U.S.C. § 1111, and makes the '937 Registration unregistrable.

10. On information and belief, the USPTO subsequently granted Reinhardt's *Application for Registration* on January 18, 2000, and issued U.S. Trademark Registration No. 2,308,937 (“**937 Registration**”) for use of the DOCKMATE mark in connection with “protective dock bumpers manufactured from copolymer or from polyethelene with indentions for using bolts to attach the bumpers to docks” in International Class 17.

11. As a result of his fraudulent, material representations in the *Application for Registration*, the '937 Registration was obtained fraudulently.

12. On information and belief, Reinhardt assigned, conveyed, and transferred all of his rights, title, and interest in and to the ‘937 Registration to Counterclaim Defendant Overton’s on or about October 15, 2003.

**Fraudulent, Material Misstatement in Section 8 and 15 Affidavit**

13. On information and belief, the Counterclaim Defendant Overton’s filed a *Combined Declaration of Use and Incontestability under Sections 7 and 15* (“**Sections 7 and 15 Affidavit**”) for the ‘937 Registration for “protective dock bumpers manufactured from copolymer or from polyethelene with indentions for using bolts to attach the bumpers to docks” in International Class 17.

14. In order for a registered trademark not to be canceled, Section 8 of the Lanham Act, 15 U.S.C. § 1058, requires that a Section 8 affidavit must, *inter alia*, be accompanied by specimens or facsimiles showing current use of the mark in commerce.

15. Counterclaim Defendant Overton’s representation to the USPTO that it submitted one specimen for each class showing the mark used in commerce or in connection with any item of listed goods was a material representation.

16. The specimens submitted to the USPTO demonstrate on their face that they are not “protective dock bumpers manufactured from copolymer or from polyethelene” but, instead, are “dock fenders” made of polyvinyl chloride.

17. Counterclaim Defendant Overton’s knew that this material representation was false when made.

18. Counterclaim Defendant Overton’s fraudulent, material representation to the USPTO was made for the purpose and with the intent of inducing the USPTO to not cancel the ‘937 Registration.

19. On information and belief, the USPTO subsequently accepted and acknowledged Counterclaim Defendant Overton's *Sections 7 and 15 Affidavit*.

20. As a result of Counterclaim Defendant Overton's fraudulent, material representations in the *Sections 7 and 15 Affidavit*, the '937 Registration was obtained fraudulently.

**Fraudulent, Material Misstatement in Sections 8 and 9 Affidavit**

21. On information and belief, the Counterclaim Defendant Overton's filed a *Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 and 9* ("**Sections 8 and 9 Affidavit**") for the '937 Registration for "protective dock bumpers manufactured from copolymer or from polyethelene with indentions for using bolts to attach the bumpers to docks" in International Class 17.

22. In order for a registered trademark not to be canceled, Section 8 of the Lanham Act, 15 U.S.C. § 1058, requires that a Section 8 affidavit must, *inter alia*, be accompanied by specimens or facsimiles showing current use of the mark in commerce.

23. Counterclaim Defendant Overton's representation to the USPTO that it submitted one specimen for each class showing the mark used in commerce or in connection with any item of listed goods was a material representation.

24. The specimens submitted to the USPTO demonstrate on their face that they are not "protective dock bumpers manufactured from copolymer or from polyethelene" but, instead, are "dock fenders" made of polyvinyl chloride.

25. Counterclaim Defendant Overton's knew that this material representation was false when made.

26. Counterclaim Defendant Overton's fraudulent, material representation to the USPTO was made for the purpose and with the intent of inducing the USPTO to not cancel and to renew the '937 Registration.

27. On information and belief, the USPTO subsequently accepted and acknowledged Counterclaim Defendant Overton's *Sections 8 and 9 Affidavit*.

28. As a result of Counterclaim Defendant Overton's fraudulent, material representations in the *Sections 8 and 9 Affidavit*, the '937 Registration was obtained fraudulently.

29. Because Counterclaim Defendant Overton's fraudulently obtained and maintained the '937 Registration, the USPTO is required to cancel it pursuant to § 14(3) of the Lanham Act, 15 U.S.C. §1064(3).

WHEREFORE, the Applicant, JPM, Inc., by its attorneys, respectfully requests that the Trademark Trial and Appeals Board enter an order:

- (A) Cancelling U.S. Trademark Registration No. 2,308,937;
- (B) Dismissing the *Notice of Opposition* filed by Gander Mountain Co. and Overton's, Inc. with prejudice;
- (C) Allowing JPM, Inc.'s *Application for Registration* (Serial No. 85/482,797) to issue a registration for its DeckMate mark on the Principal Register; and
- (D) Awarding JPM, Inc. any and all other relief that the Trademark Trial and Appeals Board deems necessary and proper under the circumstances.

**COUNT II – CANCELLATION OF U.S. TRADEMARK REGISTRATION NO. 3,449,928**

30. The Counterclaim Plaintiff hereby realleges and restates the averments contained in paragraphs 1 through 29 of these Counterclaims and incorporates the same by reference as if fully stated in this paragraph.

31. On information and belief, Counterclaim Defendant Overton's filed an *Application for Registration* (Serial No. 76/585,896) with the USPTO on or about April 27, 2004, for the DOCKMATE mark to be used in connection with "dock products, namely, steps and railings, dock wheels, piling caps, bumpers, cushions, and profiles and pads for pilings or dock posts" in International Class 19. The *Application for Registration* was filed on an intent-to-use basis pursuant to Section 1(b) of the Lanham Act, 15 U.S.C. § 1051(b), but the Counterclaim Defendant Overton's filed a *Statement of Use* on March 11, 2008, which the USPTO subsequently accepted.

32. On further information and belief, Counterclaim Defendant Overton's submitted specimens to the USPTO to demonstrate how he was using the mark in commerce, as part of its *Statement of Use*.

33. These specimens show the federal trademark registration symbol – ® – being used with the DOCKMATE mark in connection with, among other things, the sale of "non-metal profiles and pads for pilings or dock posts."

34. At the time these specimens were submitted, the DOCKMATE mark was not registered to be used in connection with such goods, and Counterclaim Defendant Overton's neither owned nor had acquired a right to use a federal trademark registration symbol in connection with the DOCKMATE mark for use with such goods.

35. Counterclaim Defendant Overton's knew that the DOCKMATE mark was not registered to be used with such goods, and that it had no right to use a federal trademark registration in connection with the DOCKMATE mark for use with such goods.

36. Counterclaim Defendant Overton's improperly used the registration symbol with the intent to deceive the purchasing public, its competitors, and the USPTO into believing that the DOCKMATE mark was registered for use with such goods.

37. On information and belief, the USPTO subsequently granted Counterclaim Defendant Overton's *Application of Registration* on June 17, 2008, and issued U.S. Trademark Registration No. 3,449,928 ("928") for use of the DOCKMATE mark in connection with "dock products, namely, dock wheels, non-metal piling caps, bumpers, cushions, and non-metal profiles and pads for pilings or dock posts" in International Class 19.

38. Counterclaim Defendant Overton's fraudulent misuse of the federal registration symbol violates Section 29 of the Lanham Act, 15 U.S.C. § 1111, and makes the '928 Registration unregistrable.

39. As a result of these fundamental, material representations in the *Application for Registration*, the '928 Registration was also obtained fraudulently.

WHEREFORE, the Counterclaim Plaintiff, JPM, Inc., by its attorneys, respectfully requests that the Trademark Trial and Appeals Board enter an order:

- (A) Cancelling U.S. Trademark Registration No. 3,449,928;
- (B) Dismissing the *Notice of Opposition* filed by Gander Mountain Co. and Overton's, Inc. with prejudice;
- (C) Allowing JPM, Inc.'s *Application for Registration* (Serial No. 85/482,797) to issue a registration for its DeckMate mark on the Principal Register; and
- (D) Awarding JPM, Inc. any and all other relief that the Trademark Trial and Appeals Board deems necessary and proper under the circumstances.



Respectfully submitted,

COSENTINO & CHRISTOFENO

Dated: October 12, 2012

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*Attorneys for Applicant JPM, Inc.*

**CERTIFICATE OF ELECTRONIC TRANSMISSION**

I hereby certify that this correspondence is being transmitted electronically through the Electronic System for Trademark Trials and Appeals (ESTTA), pursuant to 37 C.F.R. § 2.195(a), on this 12<sup>th</sup> day of October, 2012.

/Jonathan R. Slabaugh/  
Jonathan R. Slabaugh

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and complete copy of the foregoing *Answer and Affirmative Defenses to Notice of Opposition* has been served upon to Counsel for Opposers:

Mr. Jeffrey R. Cadwell  
DORSEY & WHITNEY, LLP  
50 South Sixth Street, Suite 1500  
Minneapolis, MN 55402  
[cadwell.jeffrey@dorsey.com](mailto:cadwell.jeffrey@dorsey.com)

by first-class mail, postage prepaid, on this 12<sup>th</sup> day of October, 2012.

/Jonathan R. Slabaugh/  
Jonathan R. Slabaugh